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No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICI CURIAE OF SITE SPECIFIC, INC., AND JON LEBKOWSKI IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE*

Site Specific, Inc. and Jon Lebkowsky respectfully submit this brief as *amici curiae* in support of appellees' assertion that the three-judge district court correctly determined that the Communications Decency Act of 1996 was unconstitutional.

Jon Lebkowsky is a freelance writer and online activist based in Austin, Texas. He hosts a weekly forum for activists at Hot Wired's www.talk.com and the Austin conference at Electric Minds (www.minds.com), and is currently working on a book for MIT Press. Lebkowsky also writes and distributes a periodic column, *Cyberdawg Barking*, exclusively via the Internet, reaching a potential audience of millions at minimal expense. He uses the column to communicate his ideas on freedom of speech, politics, and policy matters concerning the Internet. As an Internet-based writer, Lebkowsky hopes that this Court will recognize that he and numerous other writers depend on the Internet as a democratic, inexpensive print medium, and accord it appropriate protection.

Site Specific, Inc. is a New York corporation specializing in building interactive brands and businesses. Its services include strategic Internet consulting, web site and banner development, media planning and buying, and content licensing and syndication. Site Specific, as a "new media" company, has much in common with more traditional design companies, consulting and advertising agencies, which perform their services in the well-settled legal environment pertaining to print media. It believes that if this Court recognizes the analogy between the Internet and traditional print media, it will promote the growth and stability of new media. In addition, Site Specific's Chief Technology

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* Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Officer, Clay Shirky, is a writer who relies on the Internet as one means of distributing his thoughtful essays on the meaning of the Internet as a new medium. Like *amicus* Lebkowsky, Mr. Shirky utilizes the Internet heavily as a print medium.

Both *amici* depend on the Internet for their livelihood and for communicating with clients and colleagues. Both *amici* urge this Court to clarify and stabilize the legal rules applicable to the Internet by according speech on the Internet the highest protection accorded speech in any medium. To do so, the Court should acknowledge the essential similarity between the Internet and print media.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The Communications Decency Act of 1996 ("CDA"), 47 U.S.C. §§ 223(a)-(h), is an intrusive government regulation of constitutionally protected speech, fashioned in apparent ignorance of the technological medium it was intended to regulate. We join with appellees to urge affirmance of the judgment below holding that the CDA is unconstitutionally vague and overbroad. We file this brief, however, to urge this Court to focus on an issue the plurality deferred in *Denver Area Educational Telecommunications Consortium v. F.C.C.*, ___ U.S. ___, 116 S. Ct. 2374, 2385 (1996) ("*Denver*"): selecting "one analogy or specific set of words now" that will govern a new communications medium. We respectfully disagree with the *Denver* plurality's conclusion that it is both possible and desirable to determine *how* to treat a new medium without first determining *what* it is. In the past, this Court has walked on firmer ground when it determined the proper legal regime for new media by seeking the correct analogy. We believe there is no proper alternative but to do so here.

This Court should recognize that print media are the proper analogy for the Internet. Like print, the Internet is a means for the replication, storage and transmission of huge amounts of text of every description and on every topic. The Internet is like a giant library of all human knowledge, and imposing broadcast-style indecency regulations would have the same profoundly

destructive effects as such standards would have if imposed upon the Library of Congress. Only by recognizing the analogy between the Internet and print media will this Court assure the appropriate protection of the medium likely to become the main conduit for personal, political and creative speech in the next century.

Confusion over the proper analogy for the Internet has led to a wide variety of contradictory and legally infirm actions in state legislatures and in the courts, including numerous state laws regulating content, and the prosecution of individuals for speech which would clearly be protected in print. Only by issuing a clear ruling that the Internet is analogous to print media can this Court assure the development of a stable legal regime. Stability will promote the growth of this infant medium, while the application of broadcast-style rules will stifle the Internet's maturation.

Therefore, we join appellees in requesting this Court to affirm, but we urge that it eliminate legal confusion by specifically declaring that the Internet, in its current form, is analogous to, and should for First Amendment purposes be treated like, print media.

ARGUMENT

I. THE TIME IS RIPE FOR THIS COURT TO SELECT THE CORRECT ANALOGY FOR CYBERSPACE.

For a court to consider the proper legal regime for a new communications medium, it is essential that it first select an appropriate analogy to prior media. A decision not founded on analogical reasoning runs the risk of misapprehending the social significance of a new technology, and therefore applying the wrong rule.

In *Technologies of Freedom*, communications scholar Ithiel de Sola Pool traced the process used by this Court and others in

the nineteenth century to resolve disputes pertaining to the telegraph and telephone:

> Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraphy or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.

Ithiel de Sola Pool, *Technologies of Freedom* 100 (1983).

Benjamin Cardozo, in his seminal lectures on the Nature of the Judicial Process, described the value of what he called the "method of analogy":

> I do not mean that the directive force of history, even when its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.

Benjamin Cardozo, *The Nature of the Judicial Process* 53 (1921). Quoting Maitland, he continued: "Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow." *Id.* at 54.

Blacks Law Dictionary defines analogy as "[i]dentity or similarity of proportion, where there is no precedent in point." It continues:

> In cases on the same subject, lawyers have recourse to cases on a different subject-matter, but governed by the same general principle. This is reasoning by analogy. The similitude of relations which exist between things compared."

Black's Law Dictionary (6th ed.) 84 (1990).

Analogical reasoning is a fundamental approach by which lawyers compare new matters, including technology, to old ones in order to determine which legal rules should apply. Reasoning by analogy is "the central feature of the common law method, prevalent of course in American constitutional law." Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 781 (1993).

> [It] has the advantage, for ordinary lawyers and judges, of humility and circumspection, [and it] may be particularly desirable in contexts in which we seek moral evolution over time. . . . Analogical reasoning has the advantage of allowing a large degree of openness to new facts and perspectives. It enables disagreement and uncertainty to turn into consensus.

Id. at 782.

Likewise, Professor Tribe addressed the manner in which courts treat new technologies:

> Our constitutional law evolves through judicial interpretation, case by case, in a process of reasoning by analogy from precedent. At its best, that process is ideally suited to seeing beneath the surface and extracting deeper principles from prior decisions.

Lawrence H. Tribe, *The Constitution in Cyberspace, Opening Address at the First Conference on Computers, Freedom and Privacy* (March 26, 1991), available online at: *gopher://gopher.cpsr.org/00/cpsr/conferences/cfp91/transcripts/tribe.txt*.

Finally, Professor Kalven similarly urged some thirty years ago that the law pertaining to a new communications medium should be "determined by a choice between competing analogies." Harry Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. Law and Econ. 15, 38 (1967).

This Court has usually adopted such an approach and has searched for the appropriate analogy in determining the proper legal regime for a new technology. In *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894), this Court selected the

railroad as the appropriate analogy for the telegraph, thus determining a progeny of precedents to follow. In applying analogical reasoning, *Primrose* recognized:

> Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination.

Id. at 14.

The issue arose, as well, when the telephone was in its infancy, and many courts chose to apply jurisprudence developed for the telegraph. *See, e.g., Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 79 N.W. 315, 317 (1899) ("The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph"); *Hudson River Tel. Co. v. Watervliet Turnpike & Ry Co.*, 135 N.Y. 393, 32 N.E. 148, 149 (1892) (applying statutes authorizing telegraph transmission to telephone); *Attorney General v. Edison Telephone Co.*, 6 Q.B.D. 244 (1880) (same); *See also, Duke v. Central New Jersey Telephone Co.*, 21 A. 460 (N.J. 1891) (The telephone is a "novel method for accomplishing the object for which telegraphs were erected"); *But see Chicago Telephone Co. v. Postal Telegraph-Cable Co.*, 285 Ill. 411, 120 N.E. 795, 799 (1918) (Carter, J., dissenting) ("Telegraph companies are as distinct from telephone companies as a railroad company is distinct from a steamboat company").

However, when a court fails to use analogical reasoning and attempts to regulate a new technology without the guidance of history, it risks creating bad law. In *City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761 (1899), for example, this Court rejected the obvious parallel between telephone and telegraph:

> Governmental communications to all distant points are almost all, if not all, in writing. The useful government privileges which formed an important element in the

> legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. . . . [T]elegraphy and telephony have different significations. . . .

Id. at 776.

Determinations based upon the failure to utilize analogical reasoning are almost always eroded over time or reversed later, but may cause harm in the intervening years. For example, when this Court first considered the applicability of the First Amendment to the newly created technology of motion pictures in *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915), it distinguished them from the press and denied them protection on the grounds they were "a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of this country, or as organs of public opinion." *Id.* at 244.

Then, in 1952, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court reversed itself, recognizing the analogy between movies and printed matter:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

Id. at 501. The Court went on to recognize a need for consistency among the treatment of varying media: "Each method [of communication] tends to present its own peculiar problems. But the basic principle of freedom of speech and of the press, like the First Amendment's commandments, do not vary." *Id.* at 503.

In *Leathers v. Medlock*, 499 U.S. 439 (1991), Justices Marshall and Blackmun more recently expressed a similar view: "Although cable television transmits information by distinctive

means, the information service provided by cable does not differ significantly from the information services provided by . . . newspapers, magazines, television broadcasters, and radio stations." *Id.* at 457 (Marshall, J., joined by Blackmun, J., dissenting).

In other words, to attain consistency of First Amendment outcomes, the courts and the legislatures should treat the method of storage or transmission as irrelevant, and focus instead upon the information itself.

The law of copyright furnishes several significant examples of undesirable outcomes when courts failed to follow this approach. For example, this Court originally failed to recognize the similarity of piano rolls to sheet music, *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), and a district court misapprehended the analogy between software stored in ROM and software stored on disk, *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812 (E.D. Pa. 1982), *rev'd*, 714 F.2d 1240 (3d Cir. 1984). Such cases demonstrate how courts can impede the development of an emerging technology by failing to analogize it to an existing medium.

Professor Zechariah Chafee, perhaps the greatest First Amendment scholar of the first half of the 20th Century, also warned of the consequences of ignoring the parallels among different forms of communication:

> Newspapers, books, pamphlets and large meetings were for many centuries the only means of public discourse, so that the need for their protection has long been generally realized; on the other hand, when additional methods for spreading facts and ideas were introduced or greatly improved by modern invention, writers and judges had not got into the habit of being solicitous about guarding their freedom. And so we have tolerated censorship of the mails, the importation of foreign books, the stage, the motion picture and the radio.

Zechariah Chafee, *Free Speech in the United States*, 381 (1941).

Notwithstanding the effectiveness of analogical reasoning and the judicial success stories associated with it, many courts are still reticent to apply this approach to emerging technologies today. As recently as last year, the *Denver* plurality declined to identify an appropriate analogy for cable television:

> [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary to pick one analogy or one definitive set of words now.

Id. at 2385 (citations omitted).

As Justices Kennedy and Ginsburg noted, the plurality erred in declining to identify the correct analogy for cable, and thereby missed an important decisional opportunity:

> The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.

Id. at 2404 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgement in part and dissenting in part). They further asserted that the "creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence." *Id.* at 2406. The use of analogy is a "responsibility," rather than the "luxury" the plurality considered it to be. *Id.* at 2407. They concluded as follows:

> Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech when emerging

> technologies are concerned, because we are unsure what standard should be used to assess them. Justice Souter recommends to the Court the precept, "First, do no harm". . . . The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.

Id. at 2407.

Justice Souter, in his *Denver* concurrence, expressed concern that finding an analogy for cable might improperly predispose courts to decide cases from other technologies in the same way:

> [A]s broadcast, cable, and the cyber-technology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.

Id. at 2402 (Souter, J., concurring).

This "cyber-technology of the Internet and the World Wide Web" is before the Court right now. To delay analogical reasoning further because of the possibility of a later technological convergence would be, we submit, a serious error, especially because it is unclear whether that convergence will quickly occur. In fact, the vision of the Information Superhighway as culminating in a television set with a communications box on top is still uncertain, while the Internet thrives as a network culminating in a desktop PC. *See generally* Steven Levy, "How the Propeller Heads Stole the Electronic Future," *New York Times Sunday Magazine* (September 24, 1995) 58.

Pressing and controversial issues pertaining to speech on the Internet demand an immediate, clear and comprehensive resolution. Confusion over the applicability of the First Amendment to the Internet has already led to a plethora of inconsistent results and highly invasive federal and state legislation. In order to bring this case to complete closure, direct the courts in the resolution of future disputes, and guide Congress and the states in

future policy making, it is imperative that this Court select the proper analogy for cyberspace.

As Justice Souter said in his concurrence in *Denver*, a strict categorical approach "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." 116 S. Ct. at 2401. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L.Rev. 449, 474 (1985) (courts "should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense").

II.

THE PROPER ANALOGY FOR CYBERSPACE IS PRINT.

The district court below expressly found:

> Evidence adduced at the [preliminary injunction] hearing showed significant differences between Internet communications and communications received by radio or television. Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.

ACLU v. Reno, 929 F. Supp. 824, 845 (E.D.Pa 1996). In addition, although Chief Judge Sloviter compared the Internet to the telephone system, *id.* at 851, she also drew the parallel to print media:

> When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene, but indecent and patently offensive books and magazines abound.

Id. at 857. Thus, the chief judge would, at the very least, look to solutions historically proven to work for the print media and apply them to problems on the Internet.

By contrast, Judge Dalzell found the Internet to be a "far more speech-enhancing medium than print, the village green, or the mails," *id.* at 882, because of four related characteristics of "transcendent importance":

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

Id. at 877. By comparison, print media accomplish none of these goals, and he asserted that unwise, unconstitutional restrictions on the Internet will ultimately reduce it to the current level of print media and broadcasting:

> In this respect, the Internet would ultimately come to mirror broadcasting and print, with messages being tailored to a mainstream society from speakers who could be sure that their message was likely decent in every community in the country. * * * This change would result in an Internet that mirrors broadcasting and print, where economic power has become relatively coterminous with influence.

Id. at 878-79.

Judge Dalzell cautioned that "[w]e should also protect the autonomy that such a medium confers to ordinary people as well as media magnates." *Id.* at 882. Consequently, he would place the Internet on an even higher First Amendment pedestal than print or broadcast media:

> My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government imposed, content-based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media," [*Miami Herald Publishing Co. v.*] *Tornillo*, 418 U.S. [241,] 259 (White, J., concurring), even though the print medium *fails* to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that *succeeds* in achieving that diversity. If our Constitution "prefer[s] 'the power of reason as applied through public discussion'," *id.* (citation omitted), "[r]egardless of how beneficent-sounding the purposes of controlling the press might be", *id.*, even though "occasionally debate on vital matters will not be comprehensive and . . . all viewpoints may not be expressed", *id.* at 260, a medium that does capture comprehensive debate and does allow for the expression of all viewpoints should receive at least the same protection from intrusion.

Id. at 881.

Judge Dalzell's finding that the Internet is "a far more speech-enhancing medium than print," *id.* at 882, raises the question whether a higher degree of First Amendment protection should be applied to the Internet than has historically been granted to print media. Alternatively, by arguing that the Internet is more democratic and diverse than print, he asserts that the Internet should receive at *least* the same degree of protection available to print media.

The district court's Findings of Fact also support the argument that the Internet should be considered, for First Amendment purposes, at least equivalent to print publishing:

> Web standards . . . have grown to meet the publishing needs of many large corporations, banks, brokerage houses, newspapers and magazines which now publish "online" editions of their material, as well as government agencies, and even courts, which use the Web to disseminate information to the public. At the same time,

> Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters . . . .

Id. at 837. *See e.g.*, *The Ethical Spectacle*, a web-based magazine available at: http://www.spectacle.org (published by Jonathan Wallace d.b.a. The Ethical Spectacle, a plaintiff in this action).

Accordingly, only by treating the Internet as analogous to print media will this Court ensure the full applicability of the First Amendment in the 21st Century. It is an imaginable, even a likely outcome, that someday text printed on paper will constitute merely a small percentage of all the available text, with the rest stored in electronic format on the Internet and other networks. Only by extending to the Internet the full protections of the First Amendment established for print will this Court ensure that the same text, whether in electronic or paper form, will receive consistent treatment.

Congressional supporters of the CDA have made it absolutely clear that they intended this law to apply to literary text when published on the Internet. Congressman Goodlatte of Virginia, addressing the House of Representatives, said, "if someone transmits the entire novel '*Catcher in the Rye*' they would not be violating an indecency standard, but if they transmit only certain passages out of context they might." 142 Cong. Rec. H1145-06 (daily ed. Feb. 2, 1996) (statement of Rep. Goodlatte). The proposition that excerpts from *Catcher in the Rye*, quoted in a print essay or anthology would be 'indecent" is inherently discomforting. A failure to regard the Internet as analogous to print will create a double standard for literary works; one that allows broad protection when these works are printed on paper or stored on a shelf of a bookstore, but creates criminal liability for the same literary works and other protected speech in an electronic format.

Other commentators have drawn the analogy between the Internet and print media. For example, a leading text has described the Net as a "constellation of printing presses and bookstores":

> Every computer connected to the Net is a printing press, which its owner can use to write the next *Common Sense*, the next *Walden* or *Aeropagitica*, and send it off to the world. But every computer connected to the Net is equally a bookstore, which can store all these works and make them available to anyone who wants to download them.

Jonathan Wallace & Mark Mangan, *Sex, Laws and Cyberspace* 228 (1996).

A recent Cato Institute report recommends "a view [of] the significance of computer networks in the marketplace of ideas . . . through the lens of analogy. One could say that computer networks have the power to transform the ordinary person into a publisher, a broadcaster, [or] a newspaper editor." Solveig Bernstein, *Beyond the Communications Decency Act: Constitutional Lessons of the Internet*, 6 Cato Institute Policy Analysis No. 262 (November 4, 1996).

A leading work on the law of online services and the Internet also endorses the print analogy:

> In attempting to describe the place of online services as part of today's computer network revolution, it is natural to reach to the book metaphor as symbol and vehicle of the last glorious advance in distributing information on a previously unimagined scale. There is some validity to the model. Much of the file traffic on online systems consists of text files, which can be considered the electronic analogue to printed books. While most of the texts are still plain, more book like presentations are being introduced all the time. Sorting through text files can be much like skimming the spines in a row of books. Downloading a text file for later reading can be like taking a book home from the store, especially if the electronic service charges for the download in some form. Some providers take the book metaphor very literally. There are a growing number of actual books online in electronic text form, and a growing number of

> online services referring to themselves as electronic bookstores.

Lance Rose, *Netlaw* 18 (1995). Professor Tribe asserts that "computer gateways and bulletin boards are really the 'bookstores' of cyberspace; most of them organize and present information in a computer format, rather than generating more information content of their own." Tribe, *The Constitution in Cyberspace*, *supra*.

While broadcast media are often regarded as the death of print literacy, cyberspace has been heralded as a welcome restoration of print to primacy. Richard Lanham, a professor of English and author of a widely used text on rhetoric, has written extensively about the effects of online hypertext on literacy:

> We may expect a [good] deal of commentary greeting the electronic modification of print literacy as the death of the Western self. Surely the opposite is taking place. The characteristically unstable Western self, by turns central and social, sincere and hypocritical, philosophical and rhetorical, is just what electronic literacy has been busy revitalizing . . . .
>
> The basic implications of electronic technology may be inevitable but what we make of them certainly is not. We are free to think about, and plan for, literary creation and literary study in ways more agile, capacious, and hopeful than any generation has possessed since literature began to figure in human life.

Richard Lanham, *The Electronic Word: Democracy, Technology and the Arts* 25 (1993).

A significant pair of libel cases also treat online services, the predecessors to the Internet, as bookstores under the rule of *Smith v. California*, 361 U.S. 147 (1959) or as publishers, in accordance with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

In *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), the court considered whether to hold the Compuserve Information Service liable for an allegedly defamatory statement made online by a user of the service. The court held:

> Compuserve's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. . . . While Compuserve may decline to carry a given publication altogether, in reality, once it does decide to carry that publication, it will have little or no editorial control over that publication's contents.

Id. at 140. The court concluded that "Compuserve has no more editorial control over such a publication than does a public library, bookstore, or newsstand, and it would be no more feasible for Compuserve to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so." *Id. See also Stern v. Delphi Internet Services Corp.*, 165 Misc. 2d 21, 626 N.Y.S.2d 694, (Sup. Ct., N.Y. Co. 1995) (Online service is analogous to a news vendor or bookstore, or a letters-to-the-editor column of a newspaper).

However, in *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), when Prodigy relied upon *Cubby* in an effort to avoid defamation liability, the court rejected the defense ostensibly because Prodigy was more like a publisher that makes editorial decisions than a bookstore or library that merely distributes publications. This was due to Prodigy "[holding] itself out to the public and its members as controlling the content of its computer bulletin boards." *Id.* at 2. Significantly, both *Cubby* and *Stratton Oakmont* sought the correct analogy for online services in print media. *See also It's In The Cards, Inc., v. Fuschetto*, 193 Wis. 2d 429, 535 N.W.2d 11 (App. 1995) (Posting a message to an on-line bulletin board is a "random communication of computerized messages analogous to posting a written notice on a public bulletin board").

There is a growing tendency, endorsed by Justice Thomas and joined by the Chief Justice and Justice Scalia in the *Denver* case, to regard even cable television as analogous to print:

> In *Turner [Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. ___, 114 S. Ct. 2445 (1994)], by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that

> governs the respective First Amendment rights of competing speakers. . . . Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

116 S. Ct. at 2421 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment in part and dissenting in part).

If print is the analogy selected for cable, print must of necessity be the right analogy for cyberspace. Indeed, it would be illogical to assimilate the Internet to a broadcast model if such a model was not used for cable, which is far more similar to broadcast television than the Internet. "The weight of opinion at the moment seems to have shifted toward adopting a unitary print media model for the entire mass media. . . ." Lee C. Bollinger, *Images of a Free Press* 86 (1991) (discussing *Columbia Broadcasting Sys. v. F.C.C.*, 453 U.S. 367 [1981] [Fairness Doctrine case analogizing broadcasters to print journalists]).

As Justice Thomas noted in *Denver*, 116 S. Ct. at 2421, this Court appeared to endorse that view in *Turner*, when it wrote:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitation that characterizes the broadcast medium. . . . At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas or beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.

114 S. Ct. at 2457.

A major advantage of the analogy to print is that it forces legislators and judges to focus on the First Amendment's protective goals, rather than losing sight of them in a fruitless analysis of technological distinctions without a difference. As Professor Tribe concluded: "[T]he Constitution's norms, at their deepest

level, must be invariant under merely technological transformations." Tribe, *The Constitution in Cyberspace*, *supra*. Adoption of a print analogy will avoid the differential treatment of the same text in print and electronic versions.

CONCLUSION

In conclusion, this case provides an opportunity for this Court to create uniformity from inconsistency and order from confusion. We respectfully urge this Court to accomplish this task by finding that print is the proper analogy for the Internet.

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Respectfully Submitted,

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